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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON,

Petitioner,

vs.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF THE
UNITED STATES BUREAU OF EMPLOYEES COMPENSATION,
SIXTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

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The petitioner, Julia Thompson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (R. 26) affirming a judgment of the United States District Court in and for the Southern District of Florida dismissing the bill of complaint herein (R. 15).

Opinions Below

The opinion of the Court of Appeals is unreported and is set forth at page 22 of the Record herein. The District Court filed no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Question Presented

Does the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 901, 33 Stat. 901) bar recovery of death benefits by a deserted widow of an employee covered by the Act, if after desertion without fault on her part, the widow entered into a bigamous marital relation which had been terminated before the death of the employee, and if the widow responded negatively to her husband's query, twenty-five years after the desertion, would she "take him back"?

Statute Involved

The statute involved is Section 902(16), Title 33, United States Code, which defines "widow" as follows:

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."

Statement

Otis Thompson, a gang header on a vessel at Tampa, Florida, died as a result of injuries sustained through his employment on June 15, 1951. His employment was covered by the Longshoremen's and Harbor Workers' Compensation Act (R. 7).

Thompson had married Julia Thompson on January 15, 1921. Two children were born, and Otis and Julia Thompson lived together until 1925. In that year, Otis Thompson began an adulterous relationship with Sallie Williams, and in November, he deserted his wife, the present petitioner. Thereafter, Otis Thompson never lived with his wife and

contributed nothing to her support or for that of their children. Their marriage, however, was never terminated by divorce (R. 8).

In 1926, Otis Thompson began to live with Sallie Williams as man and wife. In 1929, he celebrated the relationship with a marriage ceremony. In 1949, Sallie Williams left Otis Thompson, except for several return visits of short duration (R. 9, 10).

Julia Thompson, for her part, went through a marriage ceremony with Jimmy Lewis Fuller in 1940. Her bigamous marital relation continued until 1949, when Fuller obtained a divorce upon grounds of desertion (R. 8, 9).

Three weeks before Otis Thompson received his fatal injuries, he visited Julia Thompson and asked if she would "take him back". She refused (R. 10).

After the death of Otis Thompson, petitioner filed a claim with the Bureau of Employees' Compensation of the United States Department of Labor for the death benefit due the widow of a deceased employee covered by the Longshoremen's and Harbor Workers' Compensation Act. After entering findings of fact, which are substantially set forth above, the respondent, as Deputy Commissioner of the Bureau, rejected the petitioner's claim for the reason, pertinent here, "That she was not living apart from Otis Thompson for justifiable cause or by reason of his desertion at the time of his death".

Petitioner then filed her Complaint in the United States District Court for the Southern District of Florida for a mandatory injunction to set aside the order rejecting the claim for death benefit. The respondents filed a motion to dismiss upon the grounds that the plaintiff below failed to state a claim upon which relief could be granted, and that it affirmatively appeared from the findings of fact in the compensation order that the order rejecting the claim of Julia Thompson for compensation was correct as a matter

of law. The court below granted the motion to dismiss (R. 1, 13, 15-16).

An appeal was taken from the Order Dismissing the Bill of Complaint to the Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment, although in its opinion it conceded that the Second, Third and Ninth Circuits have each reached an opposite rule of law, albeit upon "a completely false premise" (R. 17, 22, 24).

Reasons for Granting Writ of Certiorari

(1) The decision below and the rule adopted by the Fifth Circuit is a minority rule which is in conflict with the decisions of the Second Circuit, (See *Associated Operating Company v. Lowe*, 52 F. Supp. 550, affirmed, 138 F. 2d 916); the Third Circuit (See *Travelers Insurance Co. v. Norton*, 34 F. Supp. 740) and the Ninth Circuit (See *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988). In each of the cited cases, the facts are substantially identical with those present in the action below: an adulterous cohabitation by the wife after she began to live apart from her husband for justifiable cause or by reason of his desertion.

It is a manifest injustice and an absurdity in the administration of a federal statute designed to protect similarly situated persons in a common occupation throughout the country, to permit a widow to recover benefits if her deceased husband has worked in New York, Connecticut, Pennsylvania, New Jersey, Delaware, or the Pacific coast, but to deny her the benefits if his employment was in the Gulf states.

(2) A resolution of the conflict by this Court is required not only to obtain uniformity in the interpretation of the Longshoremen's and Harbor Workers' Compensation Act, which affects approximately 65,000 longshoremen and harbor workers (U. S. Census, 1950), and, by reason of the Defense Bases Act, (55 Stat. 622, 42 U. S. C. 1651) all per-

sons employed outside of the continental United States on defense or public works projects, but is required for the administration of two additional compensation statutes:

(a) The United States Employees' Compensation Act (5 U. S. C. 760 (H)) defines widow in almost identical language:

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death or living apart for reasonable cause or by reason of his desertion."

Although the qualification of a widow for benefits under that statute has not been tested in the courts, it has been subject to controverted holdings by the Employees' Compensation Appeals Board of the United States Department of Labor. (See *In the Matter of Rose Munoz v. War Shipping Administration*, Docket 48-114, decided August 8, 1949; *In the Matter of Rosa Pierson Estes v. Works Progress Administration*, Docket No. 50-38, decided July 20, 1951; and *In the Matter of Lucille Daniels v. Department of the Army*, Docket No. 52-168, decided August 21, 1953).

(b) The District of Columbia Workmen's Compensation Act, (36 D. C. Code 501, 45 Stat. 600) applies the provisions of the Longshoremen's Act to the payment of workmen's compensation in the District of Columbia.

A clarification of the statutory language in the Longshoremen's and Harbor Workers Compensation Act will at once resolve the conflict between the various Circuits of the United States Court of Appeals, and provide a guide to the Bureau of Employees Compensation Appeals in administering three acts which cover over two and one-half million workers in all. (See monthly Report of Employment, Executive Branch of Federal Government, June, 1953, U. S. Civil Service Commission; Statistical Abstract of the United States Department of Commerce, 1950.)

3. The decision below was erroneous. It was based upon a judicial interpolation in the Act rather than the unambiguous provisions of the Act itself. For the Courts below read into the Act a provision for inquiry into the wife's subsequent life and conduct after marital infidelity and abandonment by her husband. See *Associated Operating Co. v. Lowe*, op. cit. at p. 552. Such a provision should not be read into the Act by judicial construction, *Moore Dry Dock v. Pillsbury*, op. cit., at p. 991 and indeed, exceeds the proper bounds of the judicial function, *Travelers Insurance Co. v. Norton*, op. cit. at p. 842.

Moreover, the alternative ground for affirming the appeal by the Court of Appeals below is equally erroneous. The Appellate Court stated, in an apparent afterthought and without citation of authority, that assuming its construction of the Longshoremen's and Harbor Workers' Act to be incorrect, "the judgment should still be affirmed, since it is undisputed and found that three weeks before his death the deceased had endeavored to have the plaintiff return to him and she had refused to do so."

On the facts, the statement of the Appellate Court would appear to be exaggerated. For the findings were not that the decedent "endeavored to have the plaintiff return", but merely that 25 years after his desertion, he inquired whether she would "take him back." Obviously, a single query in the subjunctive and in the context of the long desertion and a prolonged marital infidelity cannot be said to be an "endeavor".

Endeavor or not, the Appellate Court is misstating the law as to desertion.

The law of divorce, in the Florida courts, insofar as it is based upon desertion, is incontrovertibly against the posi-

tion taken by the Court of Appeals. In *Wright v. Wright*, 87 So. 156 (1921) the Supreme Court of Florida held:

“Whatever may be the duty of either spouse during the period when the cause of action on the ground of desertion is incubating, there is no obligation upon the part of either, after the desertion has been wilful, obstinate, and continued for the period of a year, to resume the marital relations.”

In that action an offer of reconciliation came twenty months after the desertion and eight months after the cause of action accrued. The Court said:

“... (the offer) came too late, as the desertion had been obstinate, wilful, and continued for a year, and after such a desertion the injured party is within his rights if he declines to resume marital relations.”

In view of the Florida law, to which the Court of Appeals must adhere, it cannot bar the appellant her right to widow's benefits under the Act because she exercised her lawful right to refuse an offer of reconciliation which came twenty-five years after her husband deserted her. Moreover, the Court below ignored the statutory provision relating to “justifiable cause”. On the record, petitioner established such cause by the finding as to her husband's initial infidelity.

Conclusion

Inasmuch as the rulings of the Fifth Circuit are in conflict with the prevailing rule of the Second, Third and Ninth Circuits, and the Act in question is a federal statute which for the proper administration of justice requires a uniformity in interpretation, and the decision below is errone-

ous on the merits, petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

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